Ng Hong Chai v JB Securities

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-02–1025 OF 2006
RAUS SHARIF, HASAN LAH AND ABDUL MALIK ISHAK JJCA
15 AUGUST 2008

Contract — Construction of terms of contract — Employment — Plaintiff employed as remisier by securities company — Plaintiff's suspension from trading held to be lawful under terms of agreement — Appeal against — Whether right to suspend plaintiff made arbitrarily and in bad faith — Whether trial judge erred in law and in fact in finding defendant had acted bona fide

Labour Law — Employment — Remisier agreement — Plaintiff employed as remisier by securities company — Plaintiff suspended from trading by new management — Whether suspension unlawful — Whether trial judge erred in law and in fact in finding defendant had acted bona fide

The plaintiff was employed as a remisier by the defendant, a company carrying on the business of dealing in securities and a member company of the Kuala Lumpur Stock Exchange (now known as Bursa Malaysia). On 4 April 1994, the plaintiff signed a contract ('the agreement') prepared by the defendant that governed the terms of his employment as a remisier. The principal terms of the contract were contained in cl 7 of the agreement, which provided, inter alia, that the initial minimum security deposit of RM50,000 paid by the plaintiff to the defendant was to be utilised to set-off against any debt or liability incurred by the plaintiff, that the defendant may in lieu of cash accept other forms of securities from the plaintiff as deposits, and that defendant would be entitled to increase the deposit to any amount it deems fit to commensurate with the volume of business done by the plaintiff. When the plaintiff's trading volume was too big and the deposit sum of RM50,000 was insufficient to trade, the defendant requested for an additional deposit. The plaintiff agreed to give his unencumbered land titles of his three properties ('the land') as additional deposit. On 24 February 1993 the defendant took the three land titles and entered a lien holder's caveat on them for a credit sum of RM500,000. Then in May 1993, the defendant created a charge for the sum of RM750,000 as a loan purportedly given to the plaintiff. This sum of RM750,000 was subsequently increased by the defendant to RM900,000. On 22 December 1994, there was a change of management by the defendant and as from 27 December 1994 to

A 18 September 1996 the defendant suspended the plaintiff as a remisier. The plaintiff therefore instituted an action against the defendant wherein it sought a declaration that his suspension as a remisier was unlawful and damages for such unlawful suspension. The plaintiff contended that he should never have been suspended from trading at all as he had not exceeded his limit having B charged the land with a total value of RM900,000 to the defendant. The defendant in turn disputed the period of suspension as alleged by the plaintiff but contended that it had an absolute contractual right to suspend the plaintiff from trading since the suspension was with justifiable cause. The key issue at trial was whether the defendant had the right to suspend the plaintiff C from performing his trading in the normal course and after considering the evidence, the trial judge went on to hold that under cl 5(1) of the agreement, the defendant had the right to suspend the plaintiff without assigning any reasons and that the defendant's decision to suspend the plaintiff was bona fide in its commercial interest. This was the plaintiff's appeal against the High D Court's decision to dismiss the plaintiff's claim with costs. In his appeal the plaintiff contended that the suspension, which was a decision made after the change of management in the defendant company, was unlawful because the defendant's right to suspend the plaintiff was made arbitrarily and in bad faith and that the trial judge had erred in law and in fact in finding that the E defendant had acted bona fide.

Held, dismissing the appeal with costs:

F (1) (per **Raus Sharif JCA**, **Hasan Lah JCA** concuring) As the contractual relationship between the parties was governed by the terms and conditions of the agreement, the trial judge was right to hold that cl 5(1) of the agreement gave the defendant the right to suspend the G plaintiff. The wording of cl 5(1) was plain and unambiguous and therefore the trial judge was also right to construe the said clause according to its natural meaning. In addition the trial judge was correct in finding that the suspension of the plaintiff by the defendant was bona fide for good commercial reasons (see paras 17, 65, 75 & 91).

H (2) (per **Raus Sharif JCA**, **Hasan Lah JCA** concuring) The evidence of the general manager of the defendant at the material time, which was consistent with the provisions of the agreement showed that the defendant could not have acted in bad faith in suspending the plaintiff. In addition, the defendant could have proceeded with a court action to I sell the lands to settle the plaintiff's outstanding contra losses and that could have resulted in the plaintiff having to be suspended immediately and also proved to be more detrimental to the plaintiff than the present course of action adopted by the defendant. As such, the plaintiff had no basis for complaint and had in fact accepted the measures taken by the

defendant without any objection. Moreover, it was untenable for the plaintiff to suggest that as long as the land was with the defendant and was not sold there could be no suspension (paras 25 & 27).

(3) (per **Raus Sharif JCA**, **Hasan Lah JCA** concuring) In the present case the plaintiff was only suspended from trading when he failed to redeem the lands, and once the land were redeemed he was allowed to trade again. Thus the plaintiff's contention that the suspension was done arbitrarily and in bad faith was devoid of any merit. In fact all the actions taken by the defendant were in accordance with the provisions of the remisier agreement (see para 31).

(4) (per **Abdul Malik Ishak JCA** dissenting) The new management had not acted bona fide when it arbitrarily or unreasonably reduced or disregarded completely the value of the lands that were charged. Both the charge and the lien holder's caveat gave priority to the defendant and the new management was bound by the old management's arrangement with the plaintiff but notwithstanding this the defendant arbitrarily or unreasonably reduced the plaintiff's security deposit. Instead of using the agreed multiplier of net deposit, the defendant had arbitrarily or unreasonably set its own figure as the trading limit. The evidence of the general manager of the defendant also amplified this arbitrariness. However, the trial judge had erroneously found that the crucial question of the trading limit was an irrelevant consideration in adjudicating the civil suit before him. In the circumstances, the plaintiff had proved on the balance of probabilities that when the defendant imposed a trading limit not in accordance with the agreed multiplier of net deposit, then it had arbitrarily or unreasonably imposed a trading limit without taking into account the value of the lands as security deposit. Thus when the defendant suspended the plaintiff, that suspension could be said to be mala fide or without justification (see paras 92, 95, 104 & 110).

(5) (per **Abdul Malik Ishak JCA** dissenting) Moreover, it was not in dispute that the plaintiff had caused no loss whatsoever to the defendant. The evidence taken in its correct perspective went to show that the exercise of the defendant's right to suspension under the agreement was done in bad faith or unreasonably. In such a situation the plaintiff had suffered damage that was not too remote and thus ought to be restored to the position he would have been in if the damage had not occurred. As there was no explicit clause in the agreement dealing with the assessment of damages, in calculating the loss of income there should be taken into account the embarrassment and the untold humiliation suffered by the plaintiff amongst the business community in Johor Bahru (see paras 107 & 122).

[Bahasa Malaysia summary

Plaintif diambil bekerja sebagai remisier oleh defendan, sebuah syarikat yang menjalankan perniagaan menguruskan sekuriti dan ahli syarikat Bursa Saham Kuala Lumpur (sekarang dikenali sebagai Bursa Malaysia). Pada 4 April 1994, plaintif telah menandatangani satu kontrak ('perjanjian') yang telah disediakan oleh defendan yang mengawal selia terma-terma pekerjaannya sebagai remisier. Terma utama kontrak tersebut terdapat di dalam klausa 7 perjanjian tersebut, yang memperuntukkan, antara lain, deposit sekuriti permulaan yang minimum sebanyak RM50,000 yang telah dibayar oleh plaintif kepada defendan adalah untuk digunakan bagi tolakan terhadap mana-mana hutang atau liabiliti yang ditanggung oleh plaintif, yang mana defendan mungkin sebagai ganti wang tunai menerima sekuriti dalam bentuk lain daripada plaintif sebagai deposit, dan oleh itu defendan berhak untuk menambah deposit tersebut kepada apa-apa jumlah yang sesuai untuk menyeimbangkan dengan jumlah perniagaan yang dijalankan oleh plaintif. Apabila jumlah dagangan plaintif terlalu besar jumlah deposit RM50,000 adalah tidak mencukupi untuk didagangkan, defendan telah meminta untuk deposit tambahan. Plaintif telah bersetuju untuk memberikan hakmilik tanah tanpa sekatan daripada tiga hartanahnya ('tanah') sebagai deposit tambahan. Pada 24 Februari 1993 defendan telah mengambil tiga hakmilik tanah tersebut dan telah memasuki pemegang lien kaveat ke atasnya untuk kredit sejumlah RM500,000. Kemudiannya pada Mei 1993, defendan telah membuat satu gadaian untuk jumlah RM750,000 sebagai pinjaman yang bertujuan diberikan kepada plaintif. Jumlah RM750,000 ini kemudiannya dinaikkan oleh defendan kepada RM900,000. Pada 22 Disember 1994, berlakunya perubahan pengurusan oleh defendan dan mulai dari 27 Disember 1994 hingga 18 September 1996 defendan telah menggantung plaintif sebagai remisier. Plaintif oleh itu memulakan tindakan terhadap defendan di mana ianya memohon deklarasi bahawa penggantungannya sebagai remisier adalah tidak sah dan ganti rugi bagi penggantungan yang tidak sah tersebut. Plaintif menegaskan bahawa, dia tidak seharusnya digantung daripada dagangan kerana dia tidak melebihi hadnya yang menggadaikan tanah tersebut dengan dengan nilai keseluruhan sebanyak RM900,000 kepada defendan. Sebaliknya defendan mempertikaikan tempoh penggantungan seperti mana yang didakwa oleh plaintif tetapi menegaskan bahawa mereka mempunyai hak kontraktual yang mutlak untuk menggantung plaintif daripada dagangan memandangkan penggantungan adalah wajar. Isu utama ketika perbicaraan adalah sama ada defendan mempunyai hak untuk menggantung plaintif daripada melaksanakan dagangannya di dalam keadaan normal dan selepas mempertimbangkan keterangan, hakim bicara memutuskan bahawa di bawah klausa 5(1) perjanjian tersebut, defendan mempunyai hak untuk menggantung plaintif tanpa menyatakan apa-apa alasan dan oleh itu keputusan defendan untuk

menggantung plaintif adalah bona fide dalam kepentingan perniagaannya. Ini adalah rayuan plaintif terhadap keputusan Mahkamah Tinggi yang menolak tuntutan plaintif dengan kos. Dalam rayuannya, plaintif menegaskan bahawa penggantungan, yang mana adalah keputusan yang dibuat selepas pertukaran pengurusan syarikat defendan adalah tidak sah kerana hak defendan untuk menggantung plaintif telah dilakukan secara sewenang-wenangnya dan secara niat jahat dan hakim bicara telah terkhilaf dalam undang-undang dan fakta di dalam memutuskan bahawa defendan telah bertindak secara bona fide.

Diputuskan, menolak rayuan dengan kos:

(1) (oleh **Raus Sharif HMR**, **Hasan Lah HMR** bersetuju) Oleh kerana hubungan kontraktual di antara pihak-pihak dikawal selia oleh terma-terma dan syarat-syarat perjanjian tersebut, hakim bicara adalah betul dalam memutuskan bahawa klausa 5(1) perjanjian tersebut yang memberikan defendan hak untuk menggantung plaintif. Susun kata klausa 5(1) adalah jelas dan tidak kabur, oleh itu hakim bicara juga adalah betul untuk mentafsirkan klausa tersebut menurut maksud lazimnya. Selanjutnya, hakim bicara adalah betul dalam keputusannya bahawa penggantungan plaintif oleh defendan adalah bona fide bagi alasan perniagaan yang baik (lihat peranggan 17, 65, 75 & 91).

(2) (oleh **Raus Sharif HMR**, **Hasan Lah HMR** bersetuju) Keterangan pengurus besar defendan pada masa yang material, yang mana adalah selaras dengan peruntukan perjanjian tersebut, menunjukkan bahawa defendan tidak boleh bertindak secara niat jahat dalam menggantung plaintif. Selanjutnya, defendan boleh meneruskan dengan tindakan mahkamah untuk menjual tanah tersebut untuk menyelesaikan kerugian kontra tertunggak plaintif dan ini boleh mengakibatkan plaintif digantung dengan serta-merta dan juga menunjukkannya lebih menjejaskan plaintif daripada tindakan sekarang yang diambil oleh defendan. Oleh itu, plaintif tidak mempunyai asas untuk bersungut dan sebenarnya telah menerima langkah yang diambil oleh defendan tanpa apa-apa bantahan. Selanjutnya, tidak dapat dipertahankan oleh plaintif untuk mencadangkan bahawa selagi tanah tersebut masih dengan defendan dan tidak dijual, maka tidak sepatutnya terdapat penggantungan (lihat perenggan 25 & 27).

(3) (oleh **Raus Sharif HMR**, **Hasan Lah HMR** bersetuju) Dalam kes ini, plaintif hanya digantung daripada dagangan apabila dia gagal untuk menebus tanah tersebut, dan apabila tanah tersebut ditebus dia dibenarkan untuk berdagang kembali. Oleh itu penegasan plaintif bahawa penggantungan dilakukan sewenang-wenangnya dan secara niat jahat tidak mempunyai merit. Sesungguhnya, kesemua tindakan yang

A diambil oleh defendan adalah menurut peruntukan-peruntukan di dalam perjanjian remisier (lihat perenggan 31).

(4) (oleh **Abdul Malik Ishak HMR** menentang) Pengurusan yang baru tidak bertindak secara bona fide apabila secara sewenang-wenangnya B atau tanpa sebab munasabah mengurangkan atau langsung tidak mengendahkan nilai tanah yang digadaikan. Kedua-dua gadaian dan pemegang lien kaveat memberikan keutamaan kepada defendan dan pengurusan yang baru adalah terikat dengan persetujuan pengurusan lama dengan plaintif meskipun defendan secara sewenang-wenangnya C atau tidak sewajarnya mengurangkan deposit sekuriti plaintif. Selain daripada menggunakan pendarab deposit bersih yang dipersetujui, defendan telah secara sewenang-wenangnya atau tidak sewajarnya menentukan jumlah sendiri sebagai had dagangan. Tetapi, hakim bicara telah secara salah memutuskan bahawa persoalan penting had dagangan D adalah pertimbangan yang tidak relevan dalam menghakimi guaman sivil di hadapannya. Sesungguhnya, plaintif telah membuktikan atas imbangan kebarangkalian bahawa apabila defendan mengenakan had dagangan yang tidak mengikut pendarab deposit bersih yang dipersetujui, oleh itu ianya telah secara sewenang-wenangnya atau tidak E sewajarnya mengenakan had dagangan tanpa mengambilkira nilai tanah tersebut sebagai deposit sekuriti. Oleh itu, apabila defendan menggantung plaintif, penggantungan tersebut boleh dikatakan sebagai mala fide atau tanpa justifikasi (lihat perenggan 92, 95, 104 & 110).

F (5) (oleh **Abdul Malik Ishak HMR** menentang) Selanjutnya, tidak dipertikaikan bahawa plaintif tidak menyebabkan apa-apa kerugian kepada defendan. Keterangan diambil di dalam perspektif yang betul yang menunjukkan bahawa pelaksanaan hak defendan bagi penggantungan di bawah perjanjian tersebut telah dilakukan secara niat G jahat atau tidak sewajarnya. Dalam keadaan tersebut plaintif telah menanggung kerugian yang bukannya terlalu sedikit dan oleh itu perlu dikembalikan kepada kedudukannya yang asal jika kerugian tidak berlaku. Oleh kerana tiada klausa yang jelas di dalam perjanjian tersebut yang berurusan dengan taksiran ganti rugi, dalam pengiraan H kerugian pendapatan, mestilah diambil kira rasa malu dan keaiban yang tidak terkata yang ditanggung oleh plaintif di kalangan komuniti perniagaan di Johor Bahru (lihat perenggan 107 & 122).]

I **Notes**

For cases on employment, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3124–3126.

For cases on employment, labour law generally, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 831–1341.

Cases referred to

Abbott v Middleton (1855) ER 52; 21 Bear 143 (refd)

Arthur John Bethell Thellusson v Lord Rendlesham, Thomas Robarts Thellusson v Charles Sabine Augustus Thellusson, The Hon R Hare and Others v Abraham Widley Robarts and Others (1858–59) ER 11; 7 HLC 429, HL (refd)

Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd [1992] 2 MLJ 615, HC (refd)

Banco Central SA and Trevelan Navigation Inc v Lingoss & Falce Ltd and B FI Line Ltd (The 'Raven') [1980] 2 Lloyd's Rep 266 (refd)

Bank Bumiputra Malaysia Bhd Kuala Terengganu v MAE Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76, SC (not folld)

Belgravia Navigation Co SA v Cannor Shipping Ltd (The 'Troll Park') [1988] 2 Lloyd's Rep 423 (refd)

Benjamin Developments Ltd v Robt Jones (Pacific) Ltd [1994] 3 NZLR 189, CA (refd)

Birks, Kenyon v Birks, In re [1900] 1 Ch 417, CA (refd)

Blay v Pollard and Morris [1930] 1 KB 628, CA (refd)

British Movietonews Ltd v London and District Cinemas Ltd [1952] AC 166, HL (refd)

Brutus v Cozens [1973] AC 854, HL (refd)

Caledonian Railway Company v North British Railway Company (1881) 6 App Cas 114, HL (refd)

Charter Reinsurance Co Ltd v Fagan [1997] AC 313, CA (refd)

Chong Choong Hing v Tan Yee Lee (as President of the Wai Fung Wan Keng Philanthropic Amateur Dramatic Society) [1995] 3 MLJ 35, HC (refd)

Co-operative Central Bank Ltd v Y & W Development Sdn Bhd [1997] 3 MLJ 373, CA (refd)

Edison, The [1932] TLR, Probate Division (refd)

Eurico SpA v Philipp Brothers (The 'Epaphus') [1987] 2 Lloyd's Rep 215, CA (refd)

Guardian Ocean Cargoes Ltd, Transorient Ship Cargoes Ltd, Middle East Agents SAL and Med Line SA v Banco Do Brasil SA (Nos 1 and 3) [1994] 2 Lloyd's Rep 152, CA (refd)

Hadley & Anor v Baxendale & Ors (1854) 9 Exch 341, PC (refd)

Hadmor Productions Ltd & Ors v Hamilton & Anor [1983] 1 AC 191, HL (refd)

Hamilton Young & Co, In re, Ex parte Carter [1905] 2 KB 772, CA (refd)

Hill v Evans (1862) 45 ER 1195, Chancery; 4 De GF & J 288 (refd)

Investors Compensation Scheme Ltd v West Bromwich Building Society; Same v Hopkin & Sons (A Firm) & Ors [1997] UKHL 28; [1998] 1 All ER 98; [1998] 1 WLR 896, HL (refd)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196, SC (refd)

A *John Grey & Ors v William Pearson & Ors* (1857) 10 ER 1216; 6 HLC 61, HL (refd)
L Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235, HL (refd)
Lakeport Navigation Company Panama SA v Anonima Petroli Italiana SpA (The 'Olympic Brilliance') [1982] 2 Lloyd's Rep 205, CA (refd)
B *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, HL (refd)
Marquis Cholmondeley and The Honourable Ann Seymour Damer v Lord Clinton, Francis Drake, Ambrose St John, John Inglett Fortescue, Sir Lawrence Palk (deceased), Sir James Affleck, John Sawyer and William Seymour (1820)
C 37 ER 527, Chancery, 2 Jac & W1 (refd)
Mercantile Bank Ltd v The Official Assignee of the Property of How Han Teh [1969] 2 MLJ 196, HC (refd)
Metroplex Development Sdn Bhd v Mohd Mastana bin Makaddas & Anor
D [1995] 2 MLJ 276, HC (refd)
National Union of Plantations Workers v Kumpulan Jerai Sdn Bhd, Rengam [2000] 2 MLJ 144, CA (refd)
North Eastern Railway Co v Lord Hastings [1900] AC 260, HL (refd)
Pera Shipping Corp v Petroship SA (The 'Pera') [1985] 2 Lloyd's Rep 103, CA
E (refd)
Photo Production Ltd v Securicor Transport Ltd [1980] AC 827, HL (refd)
Robinson v Harman (1848) 154 ER 363; 1 Exch 850 (refd)
Robinson v Wray (1865–66) LR 1 CP 490 (refd)
F *SPP Ltd v Chew Beng Gim & Anor* [1993] 3 SLR 393, CA (refd)
Sally Wertheim v Chicoutimi Pulp Company [1911] AC 301, PC (refd)
Simpson v Margitson & Ors (1847) 116 ER 383 King's Bench; 11 QB 23, HL (refd)
Sunley (B) and Company Ltd v Cunard White Star Ltd [1940] 1 KB 740, CA
G (refd)
Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory (A Firm) [1979] AC 91, PC (refd)
United Asian Bank Bhd v Personal Representative of Roshammah (decd) & Ors [1994] 3 MLJ 327; [1994] 3 CLJ 681, HC (refd)
H *Wisma Punca Emas Sdn Bhd v Dr Donal R O'Holohan* [1987] 1 MLJ 393, SC (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Legislation referred to

I Contracts Act 1950 s 74
Contracts Act [India]
National Land Code ss 242, 257, 258, 259, 330, 321, Forms 19A, D
Rules of the High Court 1980 O 42
Securities Industry Act 1983

Appeal from: Civil Suit No MT–22–516 of 1998 (High Court, Johor Bahru)

Wong Kim Fatt (Ng Kian Pin and Wong Boon Lee with him) (Yoong & Partners) for the appellant.
Ong Chee Kwan (Lee Ong & Kandiah) for the respondent.

Raus Sharif JCA (delivering majority judgment):

[1] This appeal is directed against the decision of Johore Bahru High Court dismissing the plaintiff's claim against the defendant with costs. The plaintiff in his claim had sought:

(i) a declaration that his suspension as a remisier from 27 December 1994 to 18 September 1996 was unlawful;

(ii) damages for the unlawful suspension from 27 December 1994 to 18 September 1996 to be assessed.

[2] On 9 July 2008, we heard this appeal whereafter by majority, we dismissed it with costs (Abdul Malik Ishak JCA dissenting). For ease of reference, we shall refer the parties in this judgment as in their original capacity: the plaintiff and the defendant respectively.

BACKGROUND FACTS

[3] The brief facts relevant to this appeal are these. The defendant, a member company of the Kuala Lumpur Stock Exchange (now Bursa Malaysia), had by a letter dated 21 April 1992 offered the plaintiff employment as a remisier. The salient terms were:

(a) minimum security deposit of RM50,000;

(b) trading limit of 15 times of security deposit.

[4] On 4 April 1994, the plaintiff had signed a contract ('remisier agreement') prepared by the defendant governing the terms conditions of his employment as a remisier. The principal terms are:

(a) The plaintiff is entitled to 40% commission on the net brokerage from all sales and purchases of securities by the plaintiff's client (cl 6.2).

(b) The initial security deposit of RM50,000 was to be utilised to set-off against any debt or liability whatsoever nature which are or may be incurred by the plaintiff and due and owing to the defendant (cl 7.1).

A (c) The defendant may in lieu of cash accept other forms of securities from the plaintiff as deposits (cl 7.2).

(d) The defendant shall be entitled at any time and from time to time increase the deposit to any amount it deems fit to commensurate with
B the volume of business done by the plaintiff (cl 7.3).

(e) The plaintiff shall be responsible for all debts, interest and costs, incurred by his clients and until all monies due to the defendant are paid, the same shall constitute a debt due from the plaintiff to the
C defendant (cl 9.1).

[5] The plaintiff officially commenced his employment with the defendant on 14 October 1992. At the end of 1992, the plaintiff's trading volume was too big and the deposit sum of RM50,000 was insufficient to trade. The
D defendant requested for an additional deposit. The plaintiff agreed to give his unencumbered land titles of his three properties ('the said land') as additional deposit.

[6] The titles of the said land were given to the defendant sometime at the
E end of 1992. The defendant took the titles into account for determining the plaintiff's trading limit by describing the said land as 'collateral'. On 24 February 1993, the defendant created a lien holder's caveat for a credit sum of RM500,000. In May 1993, the defendant created a charge for the
F sum of RM750,000 as a loan purportedly given to the plaintiff.

[7] The plaintiff did not physically receive the sum of RM750,000 as it was within the contemplation of the parties that it was to create an additional deposit to enable the plaintiff to increase his trading volume. The sum of
G RM750,000 was subsequently increased by the defendant to RM900,000.

[8] On 22 December 1994, there was a change of management by the defendant. It is the plaintiff's case that after the change in the management, he was suspended either partially (in that he was allowed to trade with
H permission) or fully (which he was not allowed to trade at all) from 27 December 1994 to 17 September 1996. The plaintiff contended that he should have never been suspended from trading at all as he had not exceeded his limit after having charged the said land to the defendant which was given a total value of RM900,000.

I

[9] The defendant disputed the period of suspension as alleged by the plaintiff. The defendant was only prepared to concede that the plaintiff was only suspended from 7 May 1996 to 17 September 1996. During the period prior to 7 May 1996 the defendant denied having suspended the plaintiff

except for three days ie 27 April 1995, 24 November 1995 and 27 November 1995. In any event, it is the defendant's case that the defendant had an absolute contractual right to suspend the plaintiff from trading as at all times when the plaintiff was suspended, the defendant has had justifiable cause to do so.

[10] The learned High Court judge ('learned judge') did not come to any definite finding in relation to the days or period in which the plaintiff was fully or partially suspended from trading. He approached this case in the following manner:

> The key issue in this suit is whether the defendant had the right to suspend the plaintiff from performing his trading in the normal course. Only if the suspension was unlawful would the periods of suspension be called into question.

[11] The learned judge then went on to hold that the defendant had the right to suspend the plaintiff. He held that cl 5.1 of the remisier agreement is a binding contractual term giving the defendant the right to suspend the plaintiff without assigning any reasons. The clause was the right which the defendant had bargained for which the plaintiff had accepted. The defendant was therefore free to make any commercial decision to impose any suspension whether partially or otherwise.

[12] The learned judge also held that cl 5(1) is not tied to the security deposit that the plaintiff had to provide to the defendant or to the trading limit of the plaintiff. The agreement to accept the charge of the said land as security deposit had not modified the right under cl 5(1) which remain in force.

[13] The learned judge further held that the defendant would be liable only if it had not acted bona fide in suspending the plaintiff and attempted to justify its right to do so under cl 5(1). After considering the evidence, he found that the decision by the defendant to suspend the plaintiff was bona fide in its commercial interest.

ISSUES

[14] Before us, Dr Wong Kim Fatt, learned counsel for the plaintiff submitted that the learned judge erred in law and in fact in his findings the defendant had acted bona fide when it exercised its rights to suspend the plaintiff. Dr Wong argued that after the change in the management, the defendant arbitrarily or unreasonably disregarded completely the value of the said land as deposit. He claimed that had the value of the said land been taken into consideration, the plaintiff would not have exceeded his trading limit.

Hence, it is the contention of Dr Wong that the defendant's right to suspend the plaintiff under cl 5(1) was made arbitrarily and in bad faith. According to him, the suspension was unlawful. Citing the Supreme Court case of *Bank Bumiputra Malaysia Bhd Kuala Terengganu v MAE Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76, he submitted that the plaintiff should be entitled for damages for the period he was unlawfully suspended.

FINDINGS

[15] Like the learned judge, we are of the view that the defendant had the right to suspend the plaintiff from trading whether partially or fully. It is not disputed in this case that the terms and conditions governing the contractual relationship between the plaintiff and the defendant are governed by the remisier agreement dated 4 April 1994. Clause 5(1) of the remisier agreement provides:

> 5 Authority of Company
>
> 5.1 The Remisier hereby agrees with the Company that the Company shall be entitled at all times during the continuance of this Agreement to:
>
> (i) suspend any of the Remisier, dealing in securities without assigning any reason therefore and/or
>
> (ii) impose a security deposit on all transactions of purchasers of securities entered or to be entered into by the Remisier.

[16] To us, the above wordings of cl 5(1) are plain and unambiguous. It has been said often enough that when words of written instrument are plain and unambiguous, it must be construed according to the plain and unambiguous language of the instrument (*North Eastern Railway Co v Lord Hastings* [1900] AC 260). The learned judge was therefore right to construe cl 5(1) according to their natural meaning in that the defendant has the right to suspend the plaintiff. As correctly said by the learned judge that cl 5(1) was 'the right which the defendant had bargained for which the plaintiff had accepted'.

[17] We are also in agreement with the learned judge that the suspension of the plaintiff by the defendant was bona fide for good commercial reasons. No doubt the learned judge did not elaborate his reasons in coming to the conclusion but from the oral and documentary evidence available we have no reservation in arriving to a similar conclusion.

[18] Mr Chan Tai Beng (DW1), the general manager of the defendant at the material time, in his evidence explained that the purpose of the remisier's deposit was to protect the defendant from potential losses which may be incurred by the remisier. He explained that once the trading limit is exceeded

or is in negative, it means that the defendant is exposed to a higher amount of potential bad debts than allowed by the defendant for that remisier. As such the defendant will stop the remisier from buying any more shares on behalf of his clients until such time the remisier increases his deposit or lowers his outstanding trades to a level below the trading limit.

[19] DW1 also explained that the defendant can require the remisier to increase the amount of deposit at any time. The amount of deposit required is to be commensurate with the volume of the remisier's trading and outstanding. If the remisier has a very high volume of trade and high outstanding, he will be required to increase his deposit so that the defendant is protected from potential losses which may be incurred therefrom.

[20] DW1 further explained that the defendant normally did not accept land as a remisier's deposit for the reason that the defendant required an asset which can easily be converted to cash to set-off the remisier's losses. In the case of plaintiff the defendant accepted the charge of the said land as deposit because as in March 1993, the plaintiff had incurred a large amount of contra losses and had exceeded his trading limit. In the words of DW1 'as the loss had already been incurred, the defendant were at risk. As such, the defendant would have accepted any type of asset as security in such cases'.

[21] DW1 evidence further revealed that during the period from January 1995 to December 1995, the plaintiff continued to allow very large accumulated losses of more than RM2,000,000. The defendant then began making efforts to get the plaintiff to settle his outstanding contra losses. On 26 September 1995, part of the plaintiff's cash and withheld commission were applied to reduce the outstanding contra losses. On 21 November 1995, the defendant set-off the plaintiff remaining cash and share deposits leaving only the said land valued at RM900,000.

[22] According to DW1, while the above measures were taken, the plaintiff was still allowed to continue to trade. But he was asked to settle his outstanding contra losses. One way was to redeem the said lands. In fact prior to the defendant setting off cash and share deposits, the defendant had asked the plaintiff to redeem the said land. The plaintiff was informed that unless redeem, he will face suspension.

[23] DW1 further testified that the plaintiff by way of letters dated 10 November 1995 and 29 January 1996, proposed to the defendant for the settlement of his outstanding contra losses. In his first letter, the plaintiff stated that he would redeem the charge on the said land in four months. In his second proposal, the plaintiff stated that he would redeem the charge on the said land in five months. However, he failed to do so. In light of that, the

A defendant ceased to give the plaintiff value for the charge of the said land as at 3 May 1996. The reason being that the said land could not be immediately set-off to pay the plaintiff's outstanding debt.

B **[24]** We have no hesitation in accepting the evidence as narrated by DW1. This is because what was said by DW1 were consistent to the provisions of the remisier agreement. In fact some of the facts are not in dispute. It is not disputed that the trading volume of the plaintiff was depended on the deposit that he placed with the defendant. It is also not disputed that at the end of 1992, the plaintiff trading volume was too big and the deposit RM50,000 C was insufficient to trade. The fact that the plaintiff had sought time from the defendant to redeem the said land for the purpose of settling his outstanding contra losses was also not disputed. Only when he failed to do so, that he was suspended from trading on 7 May 1996. However, when he managed to get the Maybank Finance to redeem the said land and pay the defendant the D outstanding debt, his suspension was lifted.

[25] From the above facts, the defendant could not in any way to have acted in bad faith in suspending the plaintiff. Reasonable notice was given but despite his promises to the defendant to redeem the said land, the plaintiff E had failed to do so. As pointed by DW1, the defendant could have proceeded with a court action to sell the said land but that would have resulted in having the plaintiff to be suspended immediately. Such course of action would be more detrimental to the plaintiff.

F **[26]** Thus, the plaintiff had actually has no basis to complaint. He was given more than sufficient time to settle his outstanding contra losses by redeeming the said land. In fact the plaintiff had accepted the measures taken by the defendant without any objection. Even in his evidence, the plaintiff G admitted that the time allocation by the defendant for him to redeem the said land was in fact helping him so that the suspension would not be too long.

[27] Thus, it is untenable for the plaintiff to suggest that as long as the said land is with the defendant and not sold, there can be no suspension. To allow H such situation would mean that the defendant would be tied down and exposed without any means to mitigate the risk. It is a far fetch proposition. Thus, the Supreme Court of *Bank Bumiputra Malaysia Bhd Kuala Terengganu v MAE Perkayuan Sdn Bhd & Ors* relied upon by the plaintiff in support of his claim is of no assistance to the plaintiff.

I **[28]** In *Bank Bumiputra Malaysia Bhd Kuala Terengganu v MAE Perkayuan Sdn Bhd & Ors* the facts are these. Mae Perkayuan wanted to develop certain lands in Dungun, Terengganu into housing estate and also to purchase agricultural land in Alor Gajah, Melaka for development into a housing

estate. MAE Perkayuan approached Bank Bumiputra Malaysia Bhd Kuala Terengganu ('the bank') for bridging loan for the Dungun project and for the money to purchase the land in Alor Gajah project. The bank agreed to give over draft facilities to MAE Perkayuan in the sum of RM4,500,000. Under the terms and conditions of the agreement, the repayments were to be made by way of redemption sums from Dungun project. There was also a paragraph in the agreement that all facilities granted by the bank were subject to periodical review and repayable on demand.

[29] On 14 October 1985, the bank's manager wrote to MAE Perkayuan stating the bank had decided to withdraw the facilities and that legal action would be taken against them. On 3 November 1985, the bank's solicitors demanded repayment of the sum outstanding and interest and on 21 July 1986, the bank issued a writ against Mae Perkayuan as well as guarantors for recovery of the amount away on the over draft facilities, interest and costs.

[30] The Supreme Court in upholding the High Court decision that the bank had committed a breach of the agreement reasoned that the action of the bank to recall the facilities was premature and MAE Perkayuan was not given reasonable time for repayment of the facilities.

[31] This is not the situation in our case. In our case, the defendant was given more than ample time to redeem the said land. It was only after the plaintiff had failed to redeem the said land only then he was suspended. But once the land was redeem by the plaintiff, his suspension was lifted and he was allowed to trade again.

[32] Thus, the contention by the plaintiff that the suspension was done arbitrarily or unreasonably and in bad faith is devoid of any merit. In fact whatever actions taken by the defendant, were in accordance with the provisions of remisier agreement. While it is true that cl 7.2 of the remisier agreement, allowed the defendant to accept 'such other forms of securities' from the plaintiff as deposits, the same clause also allowed the defendant to set-off such deposits against any debt or liabilities, at the discretion of the defendant.

[33] For aforesaid reasons, we dismissed the appeal with costs. The deposit of this appeal was ordered to be paid to the defendant to account of taxed costs.

Abdul Malik Ishak JCA (delivering dissenting judgment):

NOMENCLATURE

[34] For convenience, I shall refer the parties to what they were referred to

in the High Court. Thus, Ng Hong Chai will be referred to as the plaintiff, while JB Securities will henceforth be referred to as the defendant.

FACTS OF THE CASE

[35] The plaintiff was a remisier and held a dealer's representative licence under the provisions of the Securities Industry Act 1983 (Act 280). And in that capacity, the plaintiff was in a position to carry on the business of dealing in securities as a dealer's representative.

[36] The defendant, on the other hand, is a company carrying on the business of dealing in securities and it is recognised as a member company within the meaning as ascribed to it by the Rules and Regulations of the Kuala Lumpur Stock Exchange (now known as Bursa Malaysia) by the Kuala Lumpur Stock Exchange.

[37] By way of a letter of offer dated 21 April 1992, the defendant offered to the plaintiff employment as a remisier. The salient terms of that offer may be stated as follows (see pp 311–312 of the appeal record Jilid 1 (the AR-J1):

(a) Minimum security deposit of RM50,000.

(b) Trading limit of 15 times of security deposit.

(c) Grace period of three days before interest is charged on overdue scrip.

[38] On 4 April 1994, the plaintiff signed a contract prepared by the defendant governing the terms and conditions of the plaintiff's employment as a remisier. The contract can be seen at pp 318–328 of the appeal record Jilid 2 ('AR-J2') and it is styled as the '*Remisership Agreement*' — hereinafter referred to as the 'agreement'.

[39] Clause 4 of the agreement sets out the obligations of the plaintiff as a remisier. It reads as follows:

4 REMISIER'S OBLIGATIONS

4.1 The Remisier shall:

(i) at all times perform, observe and comply with all applicable laws, regulations and directives in respect of the business of dealing with securities including but not limited to the Securities Industry Act 1983 and the Rules and Regulations of the Exchange now in force or from time to time re-enacted, amended or modified;

(ii) at all times perform, observe and comply with all terms, rules and regulations of the Company (hereinafter referred to as 'the Remisier's Manual') now in force or from time to time amended, modified, varied, substituted or added to the Remisier's Manual in any manner the Company deems fit.

The Remisier's Manual shall be taken, read and construed as an essential part of this Agreement.

4.2 The Remisier shall not at any time under any circumstances either directly or indirectly divide or share his remuneration or commission with any other person(s) and/or company or companies.

[40] The powers of the defendant as the employer are set out in cl 5 of the agreement and they are as follows:

5 AUTHORITY OF COMPANY

5.1 The Remisier hereby agrees with the Company that the Company shall be entitled at all times during the continuance of this Agreement to:

(i) suspend any of the Remisier's dealings in securities without assigning any reason therefore; and /or

(ii) impose a security deposit on all transactions of purchases of securities entered or to be entered into by the Remisier.

[41] The plaintiff's remuneration as a remisier is amply set out in cl 6 of the agreement. It is worded in this way:

6 REMISIER'S REMUNERATION

6.1 The Remisier shall be entitled to receive and shall be paid as remuneration for his services commission at the rate of forty per cent (40%) on the net brokerage earned from all sales and/or purchases of securities entered into by the Remisier (hereinafter referred to as 'the Commission').

6.2 Notwithstanding the provisions relating to the rate of the commission as hereinafter provided, the Company shall be entitled at any time and from time to time to vary at its discretion such rate of commission provided thirty (30) days' notice is given to the Remisier.

[42] Clause 7 of the agreement talks about deposit and it is worded in this way:

7 DEPOSIT

7.1 The Remisier shall pay to the Company an initial deposit of Malaysian Ringgit FIFTY THOUSAND on the execution of this Agreement (hereinafter referred to as 'the Deposit') as security for the due observance and performance by the Remisier of the terms and conditions of this Agreement; such Deposit may at the absolute discretion of the Company be utilised to set-off against any debt or liability of whatsoever nature which are or may be incurred by the Remisier and due and owing to the Company.

7.2 The Company may in lieu of cash accept such other forms of securities from the Remisier as Deposits. Quoted shares which are used as Deposits will be valued at 60% of the prevailing market price. In the event such quoted shares are used to set-off against any debts or liabilities, the Company shall have the discretion to dispose the quoted shares anytime at the market prices prevailing during the selling-out.

7.3 In addition to the Deposit, the Company shall at its absolute discretion from time to time be entitled to deduct from the Commission or other moneys due to the Remisier such sum or sums thereof to set-off against any debts or liabilities of whatsoever nature which are or may be incurred by the Remisier and due and owing to the Company.

7.4 The amount of the Deposit shall be at the discretion of the Company during the subsistence of this Agreement and should there be a shortfall consequent upon the Company's utilisation of the same or part thereof for the purpose to set-off against such debts or liabilities as aforesaid due from the Remisier and/or his clients, the Remisier shall make up each subsequent shortfall within 14 days from the date of notification in writing from the Company. Without prejudice to the foregoing, and notwithstanding anything to the contrary herein contained, the Company shall be entitled at any time and from time to time to increase the Deposit to any amount it deems fit to commensurate with the volume of business done by the Remisier by calling for increased payment from the Remisier and/or by monthly deductions from the Commission earned by the Remisier.

7.5 It is hereby agreed that the Company shall be entitled to utilise the Deposit in any manner it deems fit and on the determination of this Agreement, the Deposit shall be refunded to the Remisier together with interest accrued calculated on monthly simple interest basis as

determined by the Company from time to time and communicated to the Remisier less such sum or sums as may then be owing to the Company.

[43] Of crucial importance is cl 9.2 of the agreement. It gives, inter alia, the right to the defendant to initiate legal proceedings against the plaintiff's clients in order to recover any debt that is due. In its original text, it reads as follows:

> 9.2 Without prejudice to any rights which the Company may have, the Company reserves the right if it so desires to initiate legal proceedings against all or any of the Remisier's clients for recovery of any debt due and all costs and expenses (on a solicitor and client basis) incurred by the Company in respect of such legal proceedings shall be borne and paid by the Remisier.

[44] While cl 9.1 of the agreement imposes an onerous duty on the plaintiff as a remisier and it is worded in this way:

> 9.1 The Remisier shall be responsible for all debts, interest and costs incurred by his clients and until all monies due to the Company are paid, the same shall constitute a debt due from the Remisier to the Company.

[45] The defendant may terminate the plaintiff's appointment as a remisier subject to the conditions as set out in cl 10 of the agreement. I shall now re-produce cl 10 of the agreement:

> 10 PREMATURE TERMINATION
>
> (a) If the Remisier commits a breach of any of the terms or conditions of this Agreement;
>
> (b) If the Remisier is suspended by the Company and/or the Exchange from dealing in securities or his Dealer's Representative Licence is revoked by the Exchange;
>
> (c) If the Remisier shall not be able to obtain or renew his Dealer's Representative Licence to deal in securities for any reason whatsoever;
>
> (d) If the Remisier is guilty of any conduct which in the opinion of the Company is prejudicial or detrimental to the Company's interest;
>
> then in any of the above cases the Company may terminate the Remisier's appointment by written notice taking effect on the date of its service without prejudice to the Company's claim against the Remisier for any antecedent breach of the terms of this Agreement.

[46] Perhaps, the best part of the agreement is the right of either party to terminate the contract subject to the plaintiff as the remisier being able to clear all the outstanding contracts and settle the debts to the defendant as the employer. The right of termination is housed in cl 11 of the agreement and it is worded as follows:

11 TERMINATION

> Either party hereto may terminate this Agreement at any time hereafter by giving to the other party one (1) month's notice in writing. Provided always that the Remisier shall be responsible for the clearing of all outstanding contracts and be liable for any debts or liability of whatsoever nature which are or may be incurred by the Remisier and due and owing to the Company.

[47] The defendant has insulated itself against any liability and this is seen at cl 12 of the agreement. It is couched in this way:

12 COMPANY NOT LIABLE FOR

> The Company shall not be responsible for any act, default, neglect, error or omission, whether directly or indirectly, of the Remisier and any such act, default, error or omission shall be deemed to be an act, default, error or omission for which the Remisier shall be responsible and the Remisier shall indemnify the Company against all actions, proceedings, claims, demands, damages, costs and expenses whatsoever which the Company may be liable to suffer or incur by reason of such act, default, neglect, error or omission.

[48] A further restriction is imposed on the plaintiff as seen in cl 13 of the agreement. It is worded as follows:

13 COMPANY'S CLIENTS

> The Remisier agrees that, during the one (1) year immediately following the termination of his appointment, he will not whether on his own account or in partnership or on behalf of any other person or partnership solicit instructions from, act for or represent any person, firm or corporation who or which was a client of the Company during the period of the Remisier's appointment by the Company. Provided that this restriction shall not apply in the case of any client who was introduced to the Company by the Remisier.

[49] Based on the agreement, the relationship between the plaintiff and the defendant started. And by the end of 1992, the plaintiff's trading volume increased by leaps and bounds and the deposit sum of RM50,000 became insufficient. The defendant requested for additional deposit from the plaintiff. According to Tai Keat Chai (PW2) (see pp 183–185 of the AR-J1):

I was one of the directors who supervise the remisiers. Sometime at end of 1992, there was a discussion between me and plaintiff. Initially we asked for increase of fund — in absence of that we will listen to other suggestions. In this case, he is willing to give titles of his land as *security deposit.*

PBD-I, page 14, paragraph 7.2.

Agreement — So even under contract, anything other than cash *were* acceptable. Plaintiff deposited 3 titles with us. We lodged a lien holder's caveat.

PBD-II, page 34 — Lien Holder's Caveat.

PBD-II, page 36 — Surat Akuan.

Under this @, the value of the land was given at RM500,000.00. Subsequently, we create a charge — see p 7, PBD-II. This was the charge created in our favour — the amount was increased to *RM750,000.00*. I signed on behalf of the director.

PBD-II, page 7

The annexure at p 11, PBD-II also forms part of the charge. The *RM750,000* created in our favour was intended to protect the interest of the company insofar as the remisier's trading is concerned. Because the more the remisier is trading, the more risk is for the company. So the deposit must also be more to cover this risk. The multiple varies from company to company. I believe the plaintiff is given a multiple up to 10 times. Under the agreement, the multiple in page 2 of PBD-I is 15 times. Even amongst each remisier it can vary. There is no standard multiple. The value of the charge was increased from RM500,000.00 to RM750,000.00 and then to *RM900,000.00.*

Counsel: Is this a form of deposit?

PW.2: Yes.

[50] It was the defendant who asked for additional deposit. And the plaintiff agreed to give his three unencumbered land titles towards the end of 1992. The defendant took the three land titles into account for the purpose of determining the plaintiff's trading limit. And on 24 February 1993, the defendant entered a lien holder's caveat on the three land titles for a credit sum of RM500,000. And according to Tai Keat Chai (PW2), at the time the lien holder's caveats were entered he was not sure whether the contra losses of the plaintiff's client was greater than the existing deposit and that this question can only be ascertained by examining the account of the defendant (see p 245 of the AR-J1).

[51] In May 1993, the defendant accepted a charge given by the plaintiff for the sum of RM750,000 as a loan purportedly given to the plaintiff. The plaintiff did not physically receive the sum of RM750,000 because it was within the contemplation of the parties that it was to create an additional deposit to enable the plaintiff to increase his trading volume. The charge dated 10 April 1993 under s 242 of the National Land Code ('NLC') for the sum of RM750,000 for the three land titles can be seen at pp 352–356 of 'AR-J2'.

[52] Eventually, the value of the charge was increased to RM900,000 as reflected at p 184 of the AR-J1 (see the evidence of Tai Keat Chai (PW2)).

[53] On 22 December 1994, the defendant's management changed hands and that was the start of the nightmare for the plaintiff.

[54] The plaintiff was suspended by the defendant either partially or fully from 27 December 1994 to 17 September 1996.

LIEN HOLDERS'S CAVEATS

[55] The application for lien holder's caveats dated 24 February 1993 in accordance with s 330 of the NLC following closely Form 19D can be seen at pp 484–486 of the AR-J2. The notice of the lodgement of the lien holder's caveats dated 25 February 1993 under s 321 of the NLC vide Form 19A can also be seen at p 487 of the AR-J2.

[56] Page 486 of the AR-J2 is the '*Surat Akuan*' of Tai Keat Chai (PW2) dated 24 February 1993 and it is self-explanatory. In its original Malay language text, it reads as follows:

SURAT AKUAN

Saya, TAI KEAT CHAI (K/P No. 4645593) ialah seorang Pengarah bagi Syarikat JB SECURITIES SDN Bhd, sebuah syarikat yang ditubuhkan di Malaysia dan mengadakan pejabat tempat perniagaannya di Suite 8.1, Level 8, Menara Pelangi, No. 2 Jalan Kuning, Taman Pelangi, 80400 Johor Bahru sesunggoh dan sebenarnya mengaku bahawa:

Syarikat kami telah bersetuju untuk memberi kredit sebanyak Ringgit Lima Ratus Ribu (RM500,000) kepada Encik Ng Hong Chai (K/P No. 2306019) yang beralamat di No. 146 Jalan Inang 2, Taman Iskandar, 80050 Johor Bahru.

Sebagai jaminan bahawa Encik Ng Hong Chai akan membayar balik kredit tersebut, maka beliau bersetuju untuk membenarkan pihak kami memasukkan satu Lien Holder Kaveat atas HS(D) 12768 P.T. MLO 2780, HS(D) 12769 P.T. MLO 2781 dan HS(D) 12789 P.T. MLO 2802 semuanya dalam Mukim Plentong, Negeri Johor.

Bersama-sama ini saya lampirkan Surat Kebenaran yang diberi oleh tuanpunya tanah, Encik Ng Hong Chai.

Diperbuat dan dengan)

sebenarnya diakui oleh)

yang tersebut namanya) Sgd Illegible

TAI KEAT CHAI)

pada 24 haribulan Februari, 1993)

Di hadapan saya,

Sgd. Illegible

Pesuruhjaya Sumpah

Malaysia.

[57] Inter alia, the '*Surat Akuan*' states that the defendant agrees to give credit to the plaintiff in the sum of RM500,000. And to secure the payment of the credit, the plaintiff agrees and allows the defendant to enter lien-holder's caveats on the three land titles belonging to the plaintiff.

[58] Now, the lien creates an '*equitable*' interest in the land and that gives the defendant as a lien holder the right to enter a lien holder's caveat. Once a lien holder's caveat is entered, the defendant would automatically become a secured creditor — and this is an important factor to take into account when the plaintiff becomes a bankrupt and is facing a bankruptcy proceeding (*United Asian Bank Bhd v Personal Representative of Roshammah (decd) & Ors* [1994] 3 MLJ 327; [1994] 3 CLJ 681).

[59] The main purpose of allowing the defendant to enter a lien holder's caveat is to give the defendant the right, later on, to seek a court order for sale. If, for instance, the lien is not caveated and the plaintiff borrower defaults, the process of recovery of the unpaid loan is time consuming in that the defendant has to obtain a judgment debt and if the judgment is not satisfied, the defendant has to take an action for possession, seizure and, finally, the sale of the land. The defendant here has taken the correct step by applying for the lien holder's caveats under s 330 of the NLC to protect its interest in relation to the three land titles.

[60] It is ideal to mention that the defendant here as the lien-holder had possession of the issue document of titles to the three land titles. That gives the defendant the right to enter the caveat at any time during the currency of the loan without losing priority over subsequent purchasers of the land — the other form of security deposit tendered by the plaintiff (*Mercantile Bank Ltd v The Official Assignee of the Property of How Han Teh* [1969] 2 MLJ 196).

[61] In the event of a default, the remedy of lien-holder will be, firstly, to obtain a judgment debt under O 42 of the Rules of the High Court 1980 ('RHC') for the amount due and, secondly, to apply to the court for an order for sale pursuant to ss 257–259 of the NLC.

[62] As a lien holder, the defendant has the upper hand over the three land titles as a secured creditor without losing priority over subsequent purchasers of the land titles.

THE CHARGE

[63] Once the charge is registered, it acts as an encumbrance on the title. That encumbrance may be described as a blot on the title and it is created by virtue of the obligation of the plaintiff as the borrower to tie his three land titles to the repayment of the debt. It does not involve the transfer of any equitable or proprietary interest of the three land titles as security for the loan. This seems to be the view held by some text book writers. To me, the charge does create an equitable or proprietary interest in the charged land for the simple reason that in entering into the charge, the plaintiff as the borrower derogate from his title by setting aside his right to deal with the property absolutely, during the currency of the charge. The defendant as the chargee will benefit in that the defendant may be able to obtain an injunctive relief against the plaintiff if the latter has any plan to dispose of the property or to encumber the property further. For the defendant chargee to do all these, the defendant chargee must have proprietary interest. This is the correct view and it is the law and it is set out in *In re Hamilton Young & Co, Ex parte Carter* [1905] 2 KB 772 (CA). I adhere to this view.

[64] Here, the charge has been registered and so the defendant chargee has to take an action under the NLC. According to Gopal Sri Ram JCA, speaking for this court, in *Co-operative Central Bank Ltd v Y & W Development Sdn Bhd* [1997] 3 MLJ 373, at p 376, that on registration, the charge:

> … is not a contract. It is a statutory instrument; a dealing; which the Code authorises. Enforcement of the charge is the assertion of a statutory right. It is not an action upon the covenant.

THE AMENDED STATEMENT OF CLAIM

[65] The learned judge of the High Court alluded to the plaintiff's claim in his judgment. The plaintiff claimed for the following prayers:

(i) a declaration that the suspension of the plaintiff as a remisier from 27 December 1994 to 17 September 1996 was unlawful; and

(ii) damages for the unlawful suspension from 27 December 1994 until 17 September 1996.

THE DEFENDANT'S DEFENCE

[66] Briefly, the defence of the defendant centred on the following lines:

(i) that the defendant had the right to suspend the plaintiff;

(ii) that the plaintiff was not suspended for the periods as alleged; and

(iii) that, at all times, when the defendant suspended the plaintiff the defendant had just cause to do so and that such suspension was not unlawful.

THE AGREEMENT DATED 4 APRIL 1994

[67] According to Treitel, *The Law of Contract*, (8th Ed) 1991, at p 1, a contract is defined as:

> an agreement giving rise to obligations which are enforced or recognised by law.

[68] In *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, at p 848, Lord Diplock observed that the:

> basic principle of the common law of contract, … is that parties to a contract are free to determine for themselves what primary obligations they will accept.

[69] In construing the terms of the present agreement, one must endeavour to discover the intention of the parties (*Marquis Cholmondeley and The Honourable Ann Seymour Damer v Lord Clinton, Francis Drake, Ambrose St John, John Inglett Fortescue, Sir Lawrence Palk (deceased), Sir James Affleck, John Sawyer and William Seymour* (1820) 37 ER 527, Chancery; 2 Jac & W1), and the task of doing so must be done objectively (*Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, at pp 767, 775, 782; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28; [1998] 1 All ER 98, *Same v Hopkin & Sons (A Firm) & Ors* [1998] 1 WLR 896; and *Guardian Ocean Cargoes Ltd, Transorient Ship Cargoes Ltd, Middle East Agents SAL and Med Line SA v Banco Do Brasil SA (Nos 1 and 3)* [1994] 2 Lloyd's Rep 152 (refd), (CA). It is '*the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract*' (*Investors Compensation Scheme Ltd v West Bromwich Building Society*, *Same v Hopkin & Sons (A Firm) & Ors* at p 912).

[70] The cardinal principle to adhere to is this. That the parties have intended what they have in fact said, so that their words must be construed as they stand (*British Movietonews Ltd v London and District Cinemas Ltd* [1952] AC 166). In this context when Tai Keat Chai (PW2) said that '*anything other than cash were acceptable*' (see p 183 of the AR-J1) it must be construed to mean that the security deposit may be in the form of cash or other forms of securities as stipulated in cl 7.2 of the agreement. Thus, the

three land titles that were deposited with the defendant by the plaintiff must be held to be good as deposits and should be utilised by the defendant to set-off against any debt or liability of whatsoever nature which is incurred by the plaintiff remisier.

[71] At the end of the day, the meaning of an ordinary English word (*Brutus v Cozens* [1973] AC 854, at p 861; and *Belgravia Navigation Co SA v Cannor Shipping Ltd (The 'Troll Park')* [1988] 2 Lloyd's Rep 423 (CA)), and the meaning of any technical or commercial terms (*Hill v Evans* (1862) 45 ER 1195, Chancery; 4 De GF & J 288, at p 295), and the meaning of latent ambiguities (*Robinson v Wray* (1865–66) LR 1 CP 490) as well as the need to look at the surrounding circumstances are all questions of fact (*Simpson v Margitson & Ors* (1847) 116 ER 383 King's Bench; 11 QB 23 (refd)) for the court to consider. These are exercises which our judges are familiar with and can easily be carried out expeditiously.

[72] The law journals are replete with authorities on construction of contracts. It is an acceptable approach to say and I so say that the words are to be given their ordinary and natural meaning. Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society*, *Same v Hopkin & Sons (A Firm) & Ors* at p 913 aptly said:

> (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.

[73] Therefore, the rule that the words employed must be construed in their ordinary sense can be departed from where the meaning would simply involve an absurdity beyond description (*John Grey & Ors v William Pearson & Ors* (1857) 10 ER 1216; 6 HLC 61, at p 106 (HL); *Abbott v Middleton* (1855) ER 52; 21 Bear 143, Rolls Court; *Arthur John Bethell Thellusson v Lord Rendlesham, Thomas Robarts Thellusson v Charles Sabine Augustus Thellusson, The Hon R Hare and Others v Abraham Widley Robarts and Others* (1858–59) ER 11; 7 HLC 429, at p 519 (HL); *Caledonian Railway Company v North British Railway Company* (1881) 6 App Cas 114, at p 130; and *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, at p 387) or that it would create some inconsistency with the rest of the document. It must be borne in mind that words that are prima facie synonymous should be construed in the same sense throughout the document (*In re Birks, Kenyon v Birks* [1900] 1 Ch 417, at p 418).

[74] If the words construed in its ordinary sense give rise to an unreasonable result, then it is unlikely that that is the intention of the parties (*Banco Central SA and Trevelan Navigation Inc v Lingoss & Falce Ltd and B FI Line Ltd (The 'Raven')* [1980] 2 Lloyd's Rep 266, at p 269; *Lakeport Navigation Company Panama SA v Anonima Petroli Italiana SpA (The 'Olympic Brilliance')* [1982] 2 Lloyd's Rep 205, (CA); *Pera Shipping Corp v Petroship SA (The 'Pera')* [1985] 2 Lloyd's Rep 103, at p 107 (CA) and *Benjamin Developments Ltd v Robt Jones (Pacific) Ltd* [1994] 3 NZLR 189 (CA). Indeed, this is also the view of Lord Reid in *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, at p 251 where His Lordship said succinctly:

> The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.

[75] There is another rule of construction that must be mentioned here. It is this. That a deed or instrument shall be construed strongly against the grantor or maker thereof. *Verba cartarum fortius accipiuntur contra proferentem*. Here, the agreement was prepared by the defendant and it must therefore be construed more strongly against the defendant.

[76] With all these legal principles of construction, I must now construe the agreement accordingly.

THE LEARNED JUDGE'S FINDINGS

[77] At p 36 of the AR-J1, the learned judge of the High Court focussed on the key issue and that was whether the defendant had the right to suspend the plaintiff from performing his trading in the normal course.

[78] And at p 37 of the AR-J1, the learned judge of the High Court relied on cl 5.1 of the agreement which gives the defendant the right to suspend without assigning any reason. His Lordship also ruled that cl 5.1 of the agreement was not tied to the security deposit that the plaintiff had to provide to the defendant nor was it tied to the question of whether the trading limit of the plaintiff had been exceeded.

[79] Furthermore, at p 38 of the AR-J1, the learned judge of the High Court held that the subsequent agreement of the defendant to accept the plaintiff's three land titles as security deposit which gave the plaintiff a clear trading limit had not modified cl 5 of the agreement.

[80] The learned judge of the High Court also held that the defendant would only be liable if it had not acted bona fide in suspending the plaintiff and attempted to justify its right to do so under cl 5 of the agreement.

[81] And, finally, the learned judge of the High Court after having considered the evidence and the submissions of the parties was satisfied that the decision to suspend was made bona fide by the defendant pursuant to cl 5 of the agreement in the context of the commercial interest as explained by Chan Tai Beng ('DW1').

ANALYSIS

[82] It must be borne in mind that the trading limit is always crucial to the role and performance of a remisier like the plaintiff. If the trading limit of a remisier like the plaintiff is not subject to any control, the plaintiff as the remisier would have a free hand and would go on a buying and selling spree and in the course of which would run the risk of incurring unlimited losses which would cripple the defendant financially.

[83] The trading limit is calculated based on the agreed multiplier of net deposit and this is reflected in the re-examination of Ng Hong Chai ('PW1') at p 232 of the AR-J1. The calculation is as follows:

NET DEPOSIT	=	(cash deposit + value of shares + any other security (land) + commission withheld) MINUS (–) contra losses
NET AVAILABLE TRADING LIMIT	=	Net deposit x Agreed Multiplier MINUS (–) Client's outstanding position.

There is a direct connection between the security deposit and the trading limit (volume of business). But the learned judge of the High Court had totally failed to address his mind on this point and, consequently, his decision is flawed for the following reasons:

(a) the letter of offer sets out the trading limit of the plaintiff as a remisier to be 15 times the security deposit (see p 311 of the AR-J1);

(b) the security deposit may be in the form of cash or other forms of securities as set out in cl 7.2 of the agreement;

(c) it is not disputed that the sum of RM50,000 cash and the three land titles were used as security deposit in the form of a registered charge for the sum of RM750,000 (see pp 184, 185, and 281 of the AR-J1); and

(d) the security deposit may be utilised by the defendant to set-off against any debt or liability of whatsoever nature which is or may be incurred by the plaintiff as the remisier which is due and owing to the defendant (see p 323 of the AR-J2).

[84] Now, the change of management has been instrumental in the suspension of the plaintiff from trading either partially or fully from 27 December 1994 to 17 September 1996.

[85] The brief chronology to mirror the effect of the change of management may be stated thus:

(a) in 1992 when the plaintiff gave the three land titles as additional security, the principal officers of the defendant were Baizuri, Koh Pee Seng, Azman Manaf and Tai Keat Chai (PW2) (see the evidence of Ng Hong Chai (PW1));

(b) the old management agreed to receive the three land titles from the plaintiff as additional security to increase the trading limit of the plaintiff (see the evidence of Tai Keat Chai (PW2));

(c) the plaintiff had stated that this was the case when he was re-examined;

(d) the plaintiff's letter to Chan Tai Beng (DW1) dated 5 July 1996 marked as exh P3 is self-explanatory and it is found at pp 911–912 of the appeal record Jilid 3 (the AR-J3) and it is worded in this way:

> 5th July 1996
>
> Mr Chan Tai Beng
>
> Manager
>
> CCD
>
> Securities Sdn Bhd
>
> 8th Floor, Menara Pelangi
>
> Dear Sir,
>
> *Suspension of Trading for R10*
>
> The three title deeds for land held under MLO 2758, 2780 & 2781 I gave to KC Tai, Koh Pee Seng dan Encik Salleh in 1992 and a charge was created in May 1993 in favour of JB Securities Sdn Bhd. at the amount of RM750,000 as loans. This amount was then agreed among ourselves to be

my additional deposit and as a security for my then and future contra losses, and was later raised to RM900,000 by Koh Pee Seng and Ms. Wan in 1994 as has been reflecting in my monthly Statements. When the Company was subsequently sold and taken over by the new management who thought best the contra losses should be set off against my then deposit of about 1.52 millions in order to have a nicer picture of my statement of accounts reflected in the financial statements of JB Securities Sdn Bhd.

All my deposits and my subsequent earnings were then set off against my contra losses. As I have pointed out to you at that time my land of RM900,000 should have been taken in and calculated as an additional deposit but to no avail. The Company then suspended me in 1995 from buying and worse still from selling causing me to lose hundreds of thousands in the form of commissions as my clients were driven away by the Company's decisions.

Basing on my financial Statements with the Company since the suspension started, the RM900,000 could have been taken in as an additional deposit and a security for contra losses as agreed by the old management rather then(sic)(than) the present practice of treating it as a security for contra losses of merely about RM352,000 at present. This amount of RM352,000 includes overcharged interests as have been claimed by some of my clients.

I therefore feel that the decision to suspend me has not been justifiable and I am seeking your help in getting me the documents of the charge of my land in 1993.

Yours faithfully,

Sgd. Illegible

NG HONG CHAI.

(e) Chan Tai Beng (DW1) confirmed in cross-examination that there was a change of management on 22 December 1994 and that the CEO and directors also changed;

(f) that at para 10 of the amended statement of claim as seen at p 65 of the AR-J1, the plaintiff pleads that when the new management took over in 1994, the defendant refused to take into account the sum of RM900,000 as the additional deposit and the plaintiff re-iterated this point in examination-in-chief and in re-examination;

(g) the plaintiff was suspended for the whole of the year of 1995 as evidenced by the letter marked as exh 'P3' and Chan Tai Beng (DW1) did not reply to this letter and he too did not controvert the contents of this letter in his evidence — in reality, the defendant did not rebut the contents of this letter; and

(h) the three land titles belonging to the plaintiff were not taken as additional deposit by the new management because the defendant wanted '*to reflect a better picture on the Balance Sheet*'.

[86] From the facts, it can be discerned that the old management of the defendant which recruited the plaintiff was happy to receive the three land titles and was willing to allow the plaintiff to increase his trading volume. From the records, the reasons for the indulgence shown to the plaintiff by the defendant are quite obvious: the defendant earned a brokerage commission of nearly RM7.47m from the plaintiff's trading activities during the years 1993 and 1994. Chan Tai Beng (DW1) also confirmed that the plaintiff was one of the top and successful remisiers. The old management even allowed the plaintiff higher trading limits. Chan Tai Beng (DW1) testified that he even heard that the plaintiff had direct access to senior management who could override (DW1) himself.

[87] It is part and parcel of my judgment that the new management was less charitable and were unreasonable in that the plaintiff was not even allowed to use the security of the three land titles where the value of RM900,000 had been agreed to be given as additional deposit for the purpose of calculating the plaintiff's trading limit.

[88] Chan Tai Beng (DW1) testified under cross-examination that the plaintiff was not forced to redeem the three land titles. This was what Chan Tai Beng (DW1) testified at p 285 of the AR-J1:

> I did not personally force the plaintiff to redeem his charged property to the defendant company. I do not know if the management of the defendant forced him to.

[89] By the wilful refusal of the defendant to take into account the value of RM900,000 from the three land titles, the plaintiff was compelled to redeem the three land titles. This is set out in the evidence of the plaintiff and it has not been rebutted by the defendant.

[90] Interestingly, there is a letter from Messrs Karpal Singh & Company dated 23 July 1996 addressed to the defendant for the attention of Chan Tai Beng (DW1) as seen at p 360 of the AR-J2 requesting for the reasons for the suspension of the plaintiff. But, alas, there was no response from the defendant and such lukewarm reception suggests an inference that the real reason for the plaintiff's suspension might be embarrassing or unjustifiable. That letter from Messrs Karpal Singh & Company was worded in this way:

> Suspension
>
> We refer to the above matter and we act for Mr. Ng Hong Chai of 146, Jalan Inang Dua, Taman Iskandar, 80050 Johore Bahru, Johor. We are instructed by our client, that our client has been suspended from trading by your letter dated 27 November, 1995.

A We would be grateful if you could extend the reasons for the said suspension within three (3) days of receipt of this letter.

Your co-operation will be appreciated.

B **[91]** The new management had not acted bona fide when it arbitrarily or unreasonably reduced or disregarded completely the value of the three land titles that were charged. It was in May 1993, that the defendant created a charge for the sum of RM750,000. Not only that, earlier on, the defendant created a lien holder's caveat for the credit of RM500,000 and this was on C 24 February 1993. Both the charge and the lien-holder's caveat gave priority to the defendant. Notwithstanding all these, the defendant reduced arbitrarily or unreasonably the security deposit of the plaintiff. The new management is bound by the old management's arrangement with the plaintiff to accept the security deposit of RM900,000 or at least RM750,000 as provided by the D charge of the three land titles belonging to the plaintiff. Clause 15.1 of the agreement would bind the new management to what the old management had agreed upon. That cl 15.1 stipulates that:

(a) the expression 'the company' shall include its successors-in-title.

E

[92] Of course, the defendant shall be entitled at any time and from time to time to increase the security deposit to any amount it deems fit in order to commensurate with the trading limit (volume of business) done by the plaintiff as a remisier by calling for increased payment from the plaintiff. This F allowance is set out in cl 7.4 of the agreement. And this, by itself shows the direct connection between the value of the security deposit to the trading limit (volume of business), which the learned judge of the High Court ignored or overlooked.

G

[93] There is a memorandum issued by the defendant dated 2 December 1996 addressed to all the remisiers in the defendant's company. That can be seen at pp 393–394 of the AR-J2. The memorandum makes reference to the remisier's trading limits and it clearly shows the direct relevance of the trading H limit (volume of business) when considering the security deposit of the remisier.

[94] That being the case, instead of using the agreed multiplier of net deposit as reproduced earlier, the defendant had arbitrarily or unreasonably I set its own figure as the trading limit. Chan Tai Beng (DW1) admitted in his testimony that (see p 286 of the AR-J1):

From 27.12.1994 to 13.1.1995 — I agree the approved trading limit was arbitrarily paid (sic) (pegged) at RM4,600,000.

[95] Conservatively, the trading limit after taking into account the three land titles that were accepted by the defendant at RM900,000 should rightly be in the sum of RM647,094 x 10 times (the multiplier) equals RM6,470,940. It would therefore be within the trading limit as conceded by the defendant's counsel (see the figures at p 830 of the AR-J3).

[96] Now, even if the defendant had arbitrarily fixed the trading limit of the plaintiff at RM4,600,000, the plaintiff would still be and was within his *trading limit* after deducting the exposure of RM2,555,521. This meant that the net trading limit of RM2,044,479 was still available (see the calculations at p 830 of the AR-J3).

[97] The arbitrariness is further amplified when Chan Tai Beng (DW1) testified at p 286 of the AR-J1 to the following effect:

> I agree rightfully the trading limit should be by the multiplier but sometimes management would set a limit not based on multiplier. I am not able to say which way.

[98] And when Chan Tai Beng (DW1) was shown that the trading limit was RM4.6m, he categorically said under oath at p 282 of the AR-J1 the following sentence:

> I agree during this time plaintiff was partially suspended — needed permission to buy but can sell.

[99] The defendant had even conceded, to the advantage of the plaintiff, that if the three land titles were valued at RM900,000 then the plaintiff had not exceeded his trading limit (see pp 296, 299–300 of the AR-J1; and pp 830–841 of the AR-J3).

[100] The learned judge of the High Court made a note in his notes of proceedings at p 296 of the AR-J1 and what His Lordship wrote merits reproduction. This was what was written:

> Parties are agreed that: From 27 December 1994 – 27 November 1995 the plaintiff had never exceeded his trading limit.

[101] Again at p 299 of the AR-J1, the learned judge of the High Court recorded the following submission:

> We had not put a value of the land (we put as '*O*') with effect from 3 May 1996. We conceded that if the land value is considered (at RM900,000) then he had not exceeded his trading limit.

[102] Chan Tai Beng (DW1) further testified at p 250 of the AR-J1 that '*once the trading limit is exceeded or is in the negative*' then the defendant '*will stop the remisier from buying anymore shares on behalf of his clients until such time that the remisier increases his deposit or lowers his outstanding trades to a level below the trading limit*'.

[103] The plaintiff has proved on the balance of probabilities that when the defendant imposed a trading limit not in accordance with the agreed multiplier of net deposit as reproduced earlier, then the defendant is said to have arbitrarily or unreasonably imposed a trading limit without taking into account the value of the three land titles as security deposit. And when the defendant suspended the plaintiff, that suspension can be said to be mala fide or without justification. Chan Tai Beng (DW1) testified at p 275 of the AR-J1 that:

> When the plaintiff exceeded his trading limit, then he cannot trade except if he got the approval of senior management on a case by case basis.

[104] Through the evidence of Chan Tai Beng (DW1) it can be surmised that the defendant has unequivocally admitted by their action that the plaintiff was suspended.

[105] According to the memorandum of the defendant dated 14 August 1996 as seen at pp 372–373 of the AR-J2 that was sent to the plaintiff, the contra losses under the account of the plaintiff's clients were in the sum of approximately RM509,000. This could also be seen in a letter dated 5 July 1996 marked as exh'P3' as reproduced earlier which letter also spoke about the contra losses. According to the plaintiff at p 162 of the AR-J1:

> The value of the land at that time was RM900,000. So there was a surplus deposit. Had the original agreement been adhered to, there was definitely a surplus deposit of at least RM500,000.

[106] It is not in dispute that the plaintiff did not cause any loss whatsoever to the defendant and the plaintiff had paid every single cent owing from the plaintiff's clients' contra losses account to the defendant. All these can be seen at pp 163, 283, 299 and 300 of the AR-J1. The plaintiff had caused no loss whatsoever to the defendant. According to pp 234 and 276 of the AR-J1, the plaintiff had contributed at least RM7.47m as commissions to the defendant but, sad to say, for the splendid contribution of the plaintiff, the defendant had suspended his trading in bad faith and without any proper justification.

[107] It must be borne in mind that when the old management requested for the additional security deposit and the plaintiff responded by supplying the three land titles and the old management had not only accepted the same but has also registered a charge on them under the provisions of the NLC, that charge created an equitable or proprietary interest in favour of the old management. The new management would also benefit from this charge. And the new management cannot resile from it.

[108] Taken in its correct perspective, the exercise of the defendant's right to suspend the plaintiff under cl 5.1 of the agreement can only be construed as an act that was done in bad faith or done unreasonably.

[109] I cannot help but note, with respect, that the learned judge of the High Court took an easy way out of his predicament when he faced '*the difficulty encountered at the trial*' (see p 34 of the AR-J1) and '*for economy of efforts*' (see p 36 of AR-J1) he erroneously found that the crucial question of the trading limit was an irrelevant consideration in adjudicating the civil suit before him.

[110] There is one point which I must allude to. It is this. According to the defendant, the issue of mala fide was not pleaded by the plaintiff. Now, this issue was fully canvassed and argued without any objection before the learned judge of the High Court and the plaintiff should not be precluded from relying on this issue in this appeal before this court. Indeed, this court has said the same thing in *National Union of Plantations Workers v Kumpulan Jerai Sdn Bhd, Rengam* [2000] 2 MLJ 144 (CA).

[111] On the available evidence, I would allow the plaintiff's prayer for a declaration to the effect that his suspension as a remisier from 27 December 1994 to 17 September 1996 was unlawful. This meant that the plaintiff's appeal for this prayer should be allowed with costs here and below.

[112] I shall now say something about the damages sought by the plaintiff. The plaintiff's damages relate to loss of earnings.

[113] It is not easy to assess damages. The difficulty, however, cannot disentitle the plaintiff from pursuing his claim under this head. The court will always assess damages as best as it can on the available evidence (*Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory (A Firm)* [1979] AC 91 at p 106 (PC).

[114] The sole object of awarding damages is to compensate the plaintiff for the loss he incurs as a result of the defaults of the defendant. Damages too is awarded as a mark of disdain against the defendant who has inflicted that loss onto the plaintiff.

[115] With the arrival of *Hadley & Anor v Baxendale & Ors* (1854) 9 Exch 341 at para 341, at p 145, we now know to what extent a plaintiff is entitled to demand damages for breach of contract. A claim for damages gives rise to two distinct questions. The first is: for what kind of damage is the plaintiff entitled to recover compensation? The second question would be in regard to the principles upon which damage must be evaluated or quantified in terms of money.

[116] The first question, according to *Hadley & Anor v Baxendale & Ors*, would exclude damages which are too remote. Whereas, the second question may appropriately be tagged as the question that relates to the measure of damages.

[117] *Restitutio in integrum*. In a situation where the plaintiff has suffered damage that is not too remote, the plaintiff must, so far as money can do it, be restored to the position which the plaintiff would have been in had that particular damage not occurred (*Robinson v Harman* (1848) 154 ER 363; 1 Exch 850 at para 850, at p 363; *Sally Wertheim v Chicoutimi Pulp Company* [1911] AC 301 at p 307 (PC); *The Edison* [1932] TLR, Probate Division, para 52 at p 62–63; and *Sunley (B) and Company, Ltd v Cunard White Star, Ltd* [1940] 1 KB 740 at p 745 (CA).

[118] Alderson B, delivering the judgment of the Court of Exchequer in *Hadley & Anor v Baxendale & Ors* at para 354, at p 151 aptly said:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

[119] Section 74 of the Contracts Act 1950 (Act 136) virtually follows word for word the Indian Contract Act and it substantially affirms the rule of the common law laid down in *Hadley & Anor v Baxendale & Ors*.

Section 74 of the Contracts Act 1950 (Act 136) enacts as follows (the relevant parts only):

> Compensation for loss or damage caused by breach of contract
>
> 74(1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

[120] There is no explicit clause in the agreement dealing with the assessment of damages. The plaintiff tendered exh 'P6' to show the loss of earnings right up to 30 June 2000 as reflected at p 916 of the AR-J3. But, in the amended statement of claim, the plaintiff merely sought damages for his unlawful suspension from 27 December 1994 until 17 September 1996 and that should be assessed by the senior assistant registrar of the High Court bearing in mind that the parties should be bound by their pleadings (*Janagi v Ong Boon Kiat* [1971] 2 MLJ 196; *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 (SC); *Metroplex Development Sdn Bhd v Mohd Mastana bin Makaddas & Anor* [1995] 2 MLJ 276; *SPP Ltd v Chew Beng Gim & Anor* [1993] 3 SLR 393 at pp 398–399; *Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd* [1992] 2 MLJ 615; *Wisma Punca Emas Sdn Bhd v Dr Donal R O'Holohan* [1987] 1 MLJ 393, *Chong Choong Hing v Tan Yee Lee (as President of the Wai Fung Wan Keng Philanthropic Amateur Dramatic Society)* [1995] 3 MLJ 35; *Blay v Pollard and Morris* [1930] 1 KB 628 (CA); and *Hadmor Productions Ltd & Ors v Hamilton & Anor* [1983] 1 AC 191).

[121] In calculating the loss of income there should be taken into account the embarrassment and the untold humiliation suffered by the plaintiff amongst the business community in Johor Bahru. The quantum must reflect the arbitrary and unlawful conduct of the defendant. It is undeniable that the loss of the plaintiff's clients is irreversible.

[122] For the reasons adumbrated above, I reiterate that I must allow the plaintiff's appeal with costs here and below. Damages for the unlawful suspension from 27 December 1994 to 17 September 1996 as sought by the plaintiff in the amended statement of claim to be assessed by the senior assistant registrar of the High Court. Deposit should rightly be returned to the plaintiff.

A **[123]** As a matter of courtesy, I have circulated this dissenting judgment to my learned brothers Raus Sharif JCA and Hasan Lah JCA who sat with me in this panel.

Appeal dismissed with costs.

B

Reported by K Nesan

C

D

E

F

G

H

I